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No. 98-237

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF IN OPPOSITION RE MOOTNESS

CLIFF PALEFSKY
McGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 95133
(415) 421-9292

MICHAEL RUBIN
(*Counsel of Record*)
SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Respondent Tonyja Duffield

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Pursuant to Supreme Court Rule 15.8, plaintiff/respondent Tonyja Duffield submits this supplemental brief in opposition to certiorari to cite new matter demonstrating why the SEC's anticipated approval of the NYSE's proposed rule change will moot the Question Presented in this case. *See* Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. Relating To Arbitration Rules, SEC Release No. 34-40479, File No. SR-NYSE-98-28, 63 Fed. Reg. 52782 (Oct. 1, 1998) ("Comments") (attached hereto as Appendix SA-1).[1]

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[1] This Notice was published in the Federal Register after plaintiff-respondent Duffield sent her Brief in Opposition to the printer, and she did not become aware of the publication until after that brief was filed with the Court. *See* Sup. Ct. Rule 15.8.

Robertson Stephens contends that the NYSE's proposal to eliminate mandatory arbitration would not moot the parties' dispute (despite the anticipated SEC approval), because "the rule change would not apply to pending cases already filed in court and ordered to arbitration under the present rules." Reply Brief at 7. However, the proposed rules, attached as Appendix A to Ms. Duffield's Brief in Opposition, say no such thing, and the Comments to those rules submitted by the NYSE to the SEC (Appendix SA-1) confirm that Robertson Stephens' assertion is incorrect. *See* Comments, 63 Fed. Reg. 52782, 52783, SA-6-8 (stating, without exception: "The Exchange's proposed amendments will limit the availability of the Exchange's forum for the resolution of employment discrimination claims to those cases where the parties have agreed to arbitrate the claim after it has arisen, as recommended by the EEOC").

The NYSE's Comments on its proposed rules confirm that those rules will cover *all* cases pending in court that raise statutory employment discrimination claims, since the rules state that, upon SEC approval, the NYSE will immediately prohibit the use of its resources for arbitration of such claims unless the parties have agreed to arbitrate *after* the dispute arose. Under the rules, such claims are not "eligible for arbitration." *See* Proposed NYSE Rule 347(b).

Moreover, even if Robertson Stephens' construction of the proposed rules were correct, plaintiff's Title VII and FEHA discrimination claims in this case have *not* been ordered to arbitration. Rather, the Ninth Circuit held that those claims *could* be litigated in court, and it *reversed* the district court order compelling arbitration. Consequently, even under Robertson Stephens' reading of the NYSE's proposed rules, the parties' dispute over arbitrability *will* become moot upon SEC approval of those rules, since there is no pending order to arbitrate plaintiff's discrimination claims.

Robertson Stephens also argues that it could avoid mootness by initiating arbitration *before* the SEC approves the NYSE rule change, thus "preserv[ing] the arbitral forum for all of Duffield's claims." Reply Brief at 7. However, even if the existing NYSE rules permitted such a preemptive demand for arbitration—and no such rule is cited by Robertson Stephens—the fact remains that Robertson Stephens has *not* initiated such an arbitration proceeding (nor could it, under the current state of Ninth Circuit law). Moreover, Robertson Stephens' underlying assumption is again faulty, because nothing in the proposed NYSE rules or in the attached Comments explaining those rules exempts cases in which a party has, as Robertson Stephens proposes, simply filed a piece of paper to "initiate" arbitration.

Finally, Robertson Stephens attempts to avoid the mooting impact of the proposed NYSE rule changes by arguing that even if the NYSE forum were no longer available, it could still seek arbitration under its own private arbitration agreement. Reply Brief at 8 & n.8. However, that arbitration provision by its terms does not apply to securities traders like Ms. Duffield who are bound through signing a Form U-4 to the arbitration provisions imposed by the exchanges with which the traders registered. *See* CR 78 at 32, SER 604. And, even if Robertson Stephens' internal arbitration agreement applied to plaintiff, it would not encompass plaintiff's Title VII claims challenging defendant's hostile and discriminatory work environment, because the internal procedure applies only to disputes "arising out [of] or relating to the *termination* of any employee's employment with Robertson Stephens." *Id.* (emphasis added).[2]

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[2] Although Robertson Stephens also suggests that it could require arbitration under the NASD or American Stock Exchange ("ASE") rules, it ignores plaintiff's showing that it sought to compel arbitration in this case *only* under the NYSE rules, thereby waiving any right to compel arbitration for some other reason in some other

For these reasons, and the reasons stated in the Brief in Opposition, Robertson Stephens' Petition for Certiorari should be denied.

Respectfully submitted,

CLIFF PALEFSKY
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 95133
(415) 421-9292

MICHAEL RUBIN
(*Counsel of Record*)
SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Respondent Tonyja Duffield

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forum. Brief in Opposition at 6, 9 n.5. Robertson Stephens also ignores plaintiff's showing that the NASD forum will in any event *not* be available, because the SEC has already approved the NASD's proposed arbitration rule change effective January 1, 1999. *Id.* at 9 n.5; *see also id.* at 6 n.3 (citing Seventh and Ninth Circuit cases providing alternative grounds why NASD rules in effect when plaintiff signed her Form U-4 did not encompass Title VII claims).

Never before in this case has Robertson Stephens referred to ASE's arbitration rules, let alone claimed that they require arbitration of Ms. Duffield's claims. In fact, even if the current version of those rules applied to Ms. Duffield (which they do not, *see* ASE Arbitration Rule 600), the ASE announced on June 25, 1998 that it would be merging into the NASD by the end of the year, thereafter operating as a separate subsidiary of the NASD, whose arbitration rules would presumably be controlling. *See* Press Release, *AMEX Membership Overwhelmingly Approves NASD/AMEX Merger*, http://www.amex.com/floor/AmexNews/General/mergermembers.htm.

APPENDIX

APPENDIX

SUPPLEMENTAL APPENDIX

FEDERAL REGISTER
Vol. 63, No. 190

Notices

SECURITIES AND EXCHANGE COMMISSION (SEC)

[Release No. 34-40479; File No. SR-NYSE-98-28]

Self Regulatory Organizations; Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. Relating to Arbitration Rules

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DATE: Thursday, October 1, 1998

September 24, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on September 15, 1998 the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule changes as described in Item I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Changes

The proposed amendments to NYSE Rules 347 and 600 will exclude claims of employment discrimination,

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen. The text of the proposed rule changes are as follows (additions are italicized, deletions are bracketed.)

* * * * *

NYSE Rule 347. Controversies As to Employment or Termination of Employment

(a) Except as provided in paragraph (b), [A]any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

(b) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

NYSE Rule 600. Arbitration

(f) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration under these Rules only where the parties have agreed to arbitrate the claim after it has arisen.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the

proposed rule changes. The text of these statements may be examined at the places specified in Item IV below and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The purpose of the proposed rule changes is to:

• Exclude any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute from the requirement that all employment disputes between a registered representative and a member or member organization be arbitrated, except where the parties agree to arbitrate the claim after it has arisen. (NYSE Rule 347)

• Provide that any claim alleging employing discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen. (NYSE Rule 600)

Background

NYSE Rule 347 has been in effect since the late 1950's, and requires that any employment-related disputes between a registered representative and a member or member organization be settled by arbitration.[3] In order to become "registered" an individual is required to sign and

[3] NYSE Rule 347 provides: "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules."

file with the Exchange a Form U-4 (Uniform Application for Securities Registration or Transfer). Form U-4 requires registered persons to submit to arbitration any claim that is required to be arbitrated under the rules of the self-regulatory organizations with which they register.

Until the 1990's, the rule was generally invoked to arbitrate business and contract disputes, such as wrongful discharge, breach of contract or claims regarding compensation. Beginning with the Supreme Court's decision in *Gilmer v. Interstate Johnson Lane*,[4] claims alleging employment discrimination, including sexual harassment claims, were compelled to arbitration.

In 1994, the General Accounting Office ("GAO") conducted a study on the arbitration of employment discrimination disputes in the securities industry.[5] While the GAO Report did not address the adequacy of arbitration as a means of resolving employment discrimination disputes, it made several recommendations for improving the arbitration process. The recommendation included specialized training of arbitrators in discrimination law and the appointment of more women and minorities as arbitrators.

Despite steps to improve the process, registered representatives and others continue to oppose mandatory arbitration of discrimination claims pursuant to the Form U-4 and other pre-dispute agreements. In July 1997, the U.S. Equal Employment Opportunity Commission ("EEOC") issued a policy statement that mandatory pre-dispute agreements to arbitrate statutory discrimination claims are

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[4] 500 U.S. 20 (1991). In *Gilmer*, the Court held that a registered representative could be compelled to arbitrate his claim under the Age Discrimination in Employment Act ("ADEA") pursuant to Form U-4 and NYSE Rule 347.

[5] Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (GAO/HEHS-94-17, March 30, 1994).

inconsistent with the purpose of the federal civil right laws.[6]

Two federal court cases decided in 1998 support the EEOC's position. In January 1998, a Massachusetts district court in *Rosenberg v. Merrill Lynch*[7] declined to compel arbitration of plaintiff's Title VII and the ADEA claims pursuant to the agreement to arbitrate contained in the Form U-4 plaintiff was required to sign as a condition of her employment. In May 1998, the Court of Appeals for the Ninth Circuit held, in *Duffield v. Robertson Stephens & Company*,[8] that employers could not compel employees to waive their right to a judicial forum under Title VII, and therefore plaintiff could not be compelled to arbitrate her statutory discrimination claims pursuant to Form U-4. Prior to these decisions, federal courts had consistently upheld the arbitration of employment discrimination claims pursuant to the Form U-4.

On October 17, 1997, the National Association of Securities Dealers, Inc. ("NASD") submitted to the Commission a proposed rule change to remove the requirement from its rules that registered representatives must arbitrate statutory employment discrimination claims.[9] Under the NASD's proposal, an employee could file a claim in court unless he was obligated to arbitrate pursuant to a separate agreement entered into either before or after the dispute arose.

In announcing the approval of the NASD rule amendment, SEC Chairman Arthur Levitt "encourage[d] the other SROs to promptly change their rules to conform

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[6] EEOC Notice No. 915.002, July 10, 1997.

[7] 76 FEP 681 (D. Mass. 1998).

[8] 1998 WL 227469 (9th Cir.).

[9] Exchange Act Release No. 39421 (December 10, 1997), 62 FR 66164 (December 17, 1997).

to those of the NASD." [10] The Commission's order stated that the NASD intends to make changes to its arbitration program to make arbitration more attractive to parties for the resolution of discrimination claims.[11] The NASD previously created a "Working Group" that includes attorneys who represent employees, member firms and neutrals. The group is developing proposals and will be recommending changes to the NASD's arbitration procedures for discrimination cases. A representative of the Exchange is participating as an observer in the Working Group's discussion.

The Exchange is following Chairman Levitt's suggestion by proposing an amendment to NYSE Rule 347. The amendment will create an exception to the NYSE rule that requires arbitration of all employment-related claims of registered representatives. Paragraph (a) of the proposed amendment to NYSE Rule 347 adds language indicating that paragraph (b) contains an exception to the requirement to arbitrate employment disputes. Paragraph (b) provides that "a claim alleging employment discrimination, including any sexual harassment claims, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen." [12]

In addition, the Exchange is going further by proposing rule amendments under which statutory discrimination claims will not be eligible for arbitration pursuant to any pre-dispute agreement to arbitrate. This action brings the Exchange's arbitration policy into conformity with the EEOC's "Policy Statement on Mandatory Bind-

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[10] SEC News Release 98-61, June 23, 1998.

[11] Exchange Act Release No. 40109 (June 22, 1998), 63 FR 35299 (June 29, 1998).

[12] Claims "in violation of a statute" are not limited to the federal civil rights laws and include all federal, state and local anti-discrimination statutes.

ing Arbitration of Employment Discrimination Disputes as a Condition of Employment." [13]

In its December 1997 comment letter to the SEC regarding the NASD proposal, the EEOC reiterated its position "that pre-dispute arbitration agreements, particularly those that mandate binding arbitration of discrimination claims as a condition of employment, are contrary to the fundamental principles reflected in this nation's employment discrimination laws. We recommend therefore, that the proposed rule be revised to permit arbitration of statutory employment discrimination claims only under post-dispute arbitration agreements." [14]

The Exchange has had a general arbitration provision in its Constitution since 1817. NYSE Rule 600 requires the arbitration of disputes between customers or non-members and members or member organization, pursuant to any written agreement to arbitrate or upon the demand of the customer or non-member.[15] The vast majority of disputes resolved by Exchange arbitration are business disputes arising out of securities transactions with investors, and contractual disputes between members and their employees. Since 1992, the year following the *Gil-*

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[13] EEOC Notice No. 915.002, July 10, 1997.

[14] Letter from Gilbert F. Casellas, Chairman, EEOC, to Jonathan G. Katz, Secretary, SEC, Re: NASD Proposed Rule Change on Arbitration of Employment Discrimination Claims, December 1997.

[15] NYSE Rule 600(a) provides: "Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member."

mer decision, the Exchange has received an average of 18 discrimination claims a year.[16]

The Exchange's proposed amendments will limit the availability of the Exchange's forum for the resolution of employment discrimination claims to those cases where the parties have agreed to arbitrate the claim after it has arisen, as recommended by the EEOC.

The Exchange is also proposing to amend NYSE Rule 600, adding paragraph (f) that provides that claims alleging employment discrimination, including any sexual harassment claim, shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen. This amendment excludes from Exchange arbitration statutory employment discrimination claims of non-registered employees pursuant to pre-dispute arbitration agreements. (NYSE Rule 347 only applies to "registered" employees).

The EEOC and several members of Congress have endorsed arbitration as an effective means of resolving discrimination claims, provided the parties agree to arbitrate after the claim has arisen. The Exchange's proposed amendment provides a forum for those employees who choose, post-dispute, to resolve their statutory employment discrimination claims through arbitration.

Some employment disputes may contain both contract or tort claims as well as statutory employment discrimination claims. Under amended NYSE Rule 347 (and NYSE Rule 600 for non-registered employees who have executed pre-dispute arbitration agreements) these cases may be bifurcated. The employment discrimination claims will be

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16 Historically, discrimination claims accounted for less than two percent of the total claims filed at the Exchange, except for 1996 (when discrimination claims accounted for two point six percent) and the first six months of 1998 where, due to a steady decline in case filings generally, discrimination claims accounted for three percent of the cases filed.

heard in a forum other than the Exchange, such as court, while any claims subject to arbitration may continue to be heard at the Exchange.[17] However, NYSE Rule 347 requires arbitration of claims "at the instance" of either party, and therefore may be waived, allowing the entire case to be heard in court. The parties may also avoid bifurcation by agreeing to proceed with all claims in a single forum. Given a choice, after a dispute has arisen, employees in many instances may believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice.[18]

2. Statutory Basis

The proposed changes are consistent with Section 6 (b)(5) of the Exchange Act in that they promote just and equitable principles of trade by insuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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[17] The bifurcation of securities industry claims is not unprecedented. Before the Supreme Court's decision in *Shearson v. McMahon*, 482 U.S. 220 (1987) (holding that claims under the Exchange Act could be compelled to arbitration), the Supreme Court decided *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238 (1985). In *Byrd*, the dispute involved allegations of federal securities laws violations and pendent state law claims. The Court compelled the state law claims to arbitration and held that the federal securities laws claims could be heard in court.

[18] See *Duffield v. Robertson Stephens & Company*, 1998 WL 227469 (9th Cir.).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Changes Received from Members Participants or Others.

The Exchange has neither solicited nor received written comments on the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve the proposed rule changes, or

(B) Institute proceedings to determine whether the proposed rule changes should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes is consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th Street, NW, Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to

File No. SR-NYSE-98-28 and should be submitted by October 22, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Jonathan G. Katz,
Secretary.

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[19] 17 CFR 200.30-3(a)(12).